89-1652
89
No. (9)

Supreme Court, U.S.
FILED
DEC 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

VS.

HODARI D.,
Respondent.

On Writ of Certiorari To The California Court of Appeal First Appellate District

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

MARVIN CAHN
1256 Market Street
San Francisco, California
(415) 864-3131
Counsel of Record

DANIEL A. HOROWITZ
120 Eleventh Street
Oakland, California
Telephone: (415) 444-4888
Of Counsel

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. What practical effects will follow if this Court adopts the Californis State Attorney General's position.

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EXHIBIT LIST

(A copy of each exhibit has been lodged with the Clerk of the Court)

EXHIBIT 1	Police Report—David Wilkins arrestee
EXHIBIT 2	Medical Records—David Wilkins
EXHIBIT 3	Testimony of David Wilkins
EXHIBIT 4	"Bad Cops" Transcript of "60 Minutes" program
EXHIBIT 5	Declaration of Khaveo Barryer
EXHIBIT 6	Declaration of Jonathan Allen
EXHIBIT 7	Police Report—Tommy Walker
EXHIBIT 8	Police Report—Jasper Lowery
EXHIBIT 9	Inspector's Report (District Attorney)
EXHIBIT 10	Operation Five (OHA Investigation)
EXHIBIT 11	Operation Two (OHA Investigation)
EXHIBIT 12	San Francisco Chronicle News Article
EXHIBIT 13	Oakland Tribune News Article
EXHIBIT 14	Written Consents To File Amicus Brief

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BRIEF OF AMICUS CURIAE

Amicus Curiae, Marvin Cahn is filing this brief accompanied by the written consent of all parties to the case pursuant to Supreme Court Rule 37. The written of consents are appended hereto as Exhibit 14.

INTEREST OF AMICUS CURIAE

The Law Office of Marvin Cahn is a criminal defense office specializing in criminal defense and Constitutional issues. Our office has filed numerous Amicus briefs in numerous courts both individually and on behalf of national criminal defense organizations such as the National Association of Criminal Defense Lawyers.

Our office filed an Amicus Brief pertaining to the Oakland Housing Authority case, a case which is described in this proposed Amicus brief as being illustrative of the abuses which surround "dropsy cases". Therefore, we are closely involved with

the issues raised in this brief and we believe that knowledge of these issues may be of use to this Court.

The *Hodari D.* cases raises issues affecting civil liberties such as personal privacy, the right to freedom of movement, and the right to express distrust of police officers without fear of detention.

In addition, the outcome of *Hodari D.* will have a long term impact upon the quality of police work, the ability of prosecutors to evaluate the reliability of police reports and the ability of defense attorneys to effectively challenge the factual circumstances underlying a detention and arrest.

We perceive the Petitioner's position as creating a virtual green light to detain based upon essentially innocent responses by citizens to police officers. We fear law enforcement based upon "hunch" or "feelings of fear" and wish to urge the Court to require more substantial and objectively verifiable grounds to justify detention.

In urging this position, we seek to present this Court with material which portrays the practical import of the legal issues before the Court. Using examples drawn from cases arising out of the City of Oakland, California, where *Hodari D.* arose, we propose to demonstrate that adoption of the Petitioner's position would function to condone abuses of civil rights by police officers without any significant benefit to legitimate law enforcement.

Accordingly, we move for leave of this Court to file an *Amicus Curiae* brief herein.

SUMMARY OF ARGUMENT

The *Attorney General's position in Hodari D.* is a trojan horse providing ammunition for crooked police officers while providing little or no real benefit to honest law enforcement.

"Dropsy" narcotics cases are disfavored because legitimate "dropsy" cases are rare but perjured "dropsy" cases are common.

Rock cocaine is a dense substance and most people who run and drop cocaine actually run and toss cocaine. The small size of

the object combined with its weight usually results in the disappearance of the object. It is rare for a person to drop the drugs right by his feet. However, it is common for "dropsy" police reports to make such allegations.

The demonstration of fear towards police officers whether by facial expression, running away or by other means is unnecessary for effective drug enforcement. Drug sales on city streets are done in the open. One need only watch the dealers line the streets like vendors at a baseball game to realize the ease with which law enforcement can apprehend drug sellers. The real limitation is not the "legal technicality" imposed by the California Courts in *Hodari D.*, the real limitation is manpower to make the arrests, file the paperwork and appear in court.

ARGUMENT

A MINORITY OF "BAD COPS" HAVE CONTRIBUTED TO A GENERALIZED FEAR OF POLICE IN THE INNER CITIES; FALSIFIED DROPSY CASES ARE A FAVORED TOOL OF "BAD COPS"

A deep distrust of law enforcement pervades America's cities. The distrust ranges from a belief that the officers "just don't care" to a perception of the police as an occupying (and marauding) army.

There is no societal benefit in promoting "dropsy" cases as the "dropsy" justification is easy to manufacture and hard to disprove.

Dropsy cases are most often the result of police officers approaching citizens, questioning them, detaining them and searching them, all without legal cause. When and if drugs are found, a dropsy report is prepared.

Example 1: David Wilkins

Two police officers in a marked patrol car, enter the driveway of an eight unit housing complex. They observe two young men sitting on a bench and another young man walking away.

One of the officers thinks that the recognizes the young man who is walking away. He runs up behind him, pulls him to the

ground and when he finds the young man resistant to being restrained, he beats him. The police officer's partner approaches and says, "That's the wrong guy", the response is "I don't care and the beating continues.

The officer cuffs the young man and searches him. Finding no drugs, he takes a rock of cocaine out of his own pocket and attributes the drug to the young man.

Still, later, the police report states that this young man ran when the officer approached and as he ran he dropped cocaine on the ground.

Later, the young man is seen at the county hospital and is treated for multiple contusions. He later loses a tooth due to the beating.

In April of 1989, this actually happened to David Wilkins. In December of 1989 the Alameda County District Attorney dismissed the charges in the "interest of justice". In April of 1990, a hearing was held pursuant to California Penal Code Section 851.8.1.[1]

After days of hearing at which the former defendant, the arresting officer, the Chief of Police and others testified, the Superior Court judge found David Wilkins factually innocent. In making that ruling, the Judge stated that he believed David Wilkins and did not believe the arresting officer or the Chief of Police.

The "he ran, he dropped" charge made the case one of David Wilkin's word against the officers. The defense was able to present evidence of prior perjury by the officer and inconsistencies in testimony. Also, David Wilkins had only one criminal conviction (Driving on a suspended license) and had a work history

[1] California Penal Code section 851.8 provides in part "(c) In any case where a person has been arrested and an accusatory pleading has been filed, but where no conviction has occurred, the defendant may, at any time after dismissal of the action, petition the court which dismissed the action for a finding that the defendant is factually innocent of the charges . . ."

working as a children's recreation director. In most cases, the defendant would not be able to testify and the police officer would have prevailed.

Meanwhile, David Wilkins lost his job as a children's recreation director due to this arrest. He moved out of Oakland and he is so upset about what happened that he will not return, even to visit.

Example 2

CASE STUDY: THE OAKLAND HOUSING AUTHORITY

Recently, the City of Oakland, California, was rocked by a corruption scandal which touched virtually every member of the 26 man Oakland Housing Authority police force. This scandal uncovered evidence of drug planting and general searches all covered by false police reports which usually contained the "He ran, he dropped" scenario. The results of the investigation (the largest police corruption investigation in Northern California history) led to the indictment of six officers. The investigative findings detail a template of corruption built upon the "He ran, he dropped" false police report. The position urged by the Attorney General would only promote more corruption of the type found in Oakland. Ironically, the Attorney General's office was a major participant in the Oakland Housing Authority investigation.

The Housing Authority

This police force patrols over 3300 units which are owned or supervised by the Oakland Housing Authority. The Housing Authority police force is comprised of officers who have performed prior service for the police forces of other cities and of new recruits. The force is almost entirely funded by grants from H.U.D.

The Scandal

The scandal uncovered large scale drug planting, perjury and theft. The main methods used to justify these crimes were "dropsy" and "runner" police reports. This corrupt department was investigated by the State Attorney General, local law enforcement and the F.B.I. What was uncovered is instructive not just as

to the tactics of one corrupt police force but as a map as to the general practices of corrupt law enforcement in general. (In fact, two Oakland Police officers were arrested during this Housing Authority Investigation).

The Investigation

The Alameda County District Attorney's office, State Attorney General and other police agencies launched an investigation which included nine undercover operations. In each of these nine operations, Housing Authority officers, planted drugs and often also beat or robbed the undercover officers. During each of these undercover operations, the Housing Authority Officers made false dropsy claims (or similar claims) and filed false police reports. Often money was taken and beatings were administered. All of these crimes were recorded on videotape.

In addition, Oakland Police officer Lundquist, whose job was to review all narcotics arrests (whether by the Oakland Housing Police or by the Oakland Police Department) became suspicious when he found that 75% of the Housing Authority arrests were dropsy cases. He noted that real dropsy cases were rare because the drugs were usually thrown where they could not be recovered.

This report should not be considered less meaningful because it involves Housing Authority officers and not Oakland Police officers (as in Hodari D.), we have included the report of Undercover Operation Number 5 where two Oakland Police officers were caught in the Housing Authority net. Their crime, a false police report falsely alleging a "dropsy".

Attached as Exhibits to this Amicus brief are documentation of some of the undercover operations directed at the Oakland Housing Police. We have also enclosed police reports and other material describing egregious but typical "dropsy" and "runner" cases.

The following are quotations from former OHA officers.

> "We brutalized people, we stole their money, we planted drugs on them to take them off the street." (Jeff Garden, Transcript 60 Minutes, page 1, Exhibit 4)

> "When I first started, they . . . they said, if the guy runs, beat him up. If he's you know . . ." (Jeff Garden, Transcript 60 Minutes, page 3, Exhibit 4)

> "We'd be driving, and all of a sudden he would just stop a group of people, and we'd get out, and we'd make contact with them, if they took off running, we'd chase them and catch them and bring them back.
>
> WALLACE: Did you have any reason to believe that they had drugs?
>
> "Well no, we didn't." (Jeff Garden, Transcript 60 Minutes, page 8, Exhibit 4)

> "Sergeant Broussard felt I did not have probable cause to search Mr. Finley's groin. He advised me to manufacture probable cause. He told me to write a report that I saw Mr. Finley throw the narcotics to the ground. I prepared the police report falsely in accordance with Sergeant Broussard's instructions." (Declaration of Khaveo Barryer, Former OHA Officer, Exhibit 5 at page 3)

> "I heard over the radio that Sergeant Broussard 'had a runner' . . . I saw Officer Garden chasing a male black. . . . I gave chase of the suspect on foot and finally apprehended and detained him. At this point Officer Dwyer arrived and cracked the suspect over the head with a weapon . . . Sergeant Broussard then asked, 'now that we have the suspect, what are we going to arrest him for?' I saw Officer Garden go over to an OHA vehicle, raise the trunk, reach inside a brief case, and pull out a small plastic baggie containing a rock of cocaine. . . . The suspect was then placed in an OHA vehicle containing the rock so that possession of the cocaine would be attributed to him." ((Declaration of Khaveo Barryer, Former OHA Officer, Exhibit 5 at page 4)

> "I was involved in a juvenile narcotics case in which Sergeant David Watson and I falsified an arrest report and lied under oath. . . . We pulled up to two juveniles, who were standing in front of a bungalow in which one of them lived. We asked them to approach the car, searched them and

placed them in the back of our car for ten minutes. Watson went to a nearby brick wall and retrieved a black film container. He found some cocaine rocks inside. . . . When it came time to go to court on the case, Watson did not want me to testify and Chief Smith ordered me to follow Watson's instructions. . . . Watson testified that he had seen Wilson throw the drugs down. I testified as instructed by Watson (and by Smith) that I did not remember the incident or Wilson. I searched Wilson at the scene, but I denied that under oath. I recalled observing Wilson as long as Watson, and never saw him in possession of narcotics or dropping any drugs. I committed perjury in this case."

(Declaration of Jonathan Allen, former OHA officer, Exhibit 6 at pages 6-7)

Example 3: Tommy Walker

Tommy Walker, an employed janitor with no prior criminal history, was with friends on the street in Oakland. A few minutes earlier they had been playing dice. When the police approached his friends ran. Tommy, weighing 280 pounds and standing only six feet tall, did not run effectively.

He was jumped on by an officer who was a black belt in karate and who trained other officers in self-defense (Officer McQueen, the same officer who beat David Wilkins [Example 1] and who is still a member in good standing with his department). This officer broke Tommy's leg. He then claimed that he found narcotics dropped by Tommy Walker. The officer claimed:

"On the date/time listed while conducting patrol duties in an 'unmarked' patrol vehicle I observed susp. Walker standing in the driveway of 2247 E. 19th St. I pulled over and exited my vehicle to conduct routine area checks at which time susp. Walker appeared startled as he abruptly turned and began to run to the rear of 2247 E. 19th St.

Observing this unusual behavior I followed him (Walker) on foot at which time I clearly observed him as he simultaneously threw down evidence 1 and 2 to the ground. . ."

(Police Report, Page 2, Exhibit 7)

The Alameda County District Attorney dismissed charges against Mr. Walker. Mr. Walker filed a civil rights suit under 42 U.S.C. 1983 in federal court and has recently settled his case (as part of a comprehensive settlement involving 42 plaintiffs).

Example 4: Jasper Lowery

Jasper Lowery is a mentally ill young man who lives with his elderly mother in East Oakland. On June 8, 1989, a team of Oakland Housing Officers swooped down and arrested him. His mother who observed the entire incident attempted to intervene and prevent his arrest, stating that he had done nothing at all wrong. She was threatened. In the police report the officer claimed:

". . .I observed the suspect I.F.O. 1458 52nd Ave. crouched down, as I attempted to contact suspect, suspect made a suspicious tossing action with his right hand . . . I pat searched the suspect for officer safety and discovered the # 2 evidence in the right/chest jacket of suspect . . . I further retrieved the # 1 evidence which I observed suspect toss . . . "

(Police Report, Exhibit 8, page 3)

Charges were dismissed by the Alameda County District Attorney and Mr. Lowery and his mother were among the successful plaintiffs in the 42 U.S.C. 1983 action.

Example 5: Not Just The Housing Authority

The Housing Authority Investigation caught regular Oakland Police officers in its net. Exhibit 9 is part of the report of investigation from the Alameda County District Attorney's office. Exhibit 10 is documentation of operation 5 in which two Oakland Police officers were caught in a sting meant for OHA officers. The "he ran, he dropped" syndrome is a fall back in many police departments for corrupt officers. OHA is different only in that the technique was their primary method of operation.

The Oakland Police know that dropsy cases are suspect. In the D.A.'s investigative report, page 3, it describes the suspicions of Oakland Police Officer Lundquist as follows:

> "Officer Lundquist started to review the OHA reports . . . In reviewing these cases Officer Lundquist said that about 75% of them were what he classified as 'dropsy cases', . . . He told us that he compared this percentage with the Oakland Police Department Special Duty Unit, which also works as a Narcotic Task Force and their arrests for 'dropsy cases' are a small percentage of the type of arrests they make. The reason for this is because most suspects who see an officer will run and while they are running they will drop the narcotics out of view."

During undercover Operation Five (where one police investigator would place narcotics near another undercover officer [who never touched any drugs], a call would be made to OHA and the OHA officers would then arrest the person, search for the drugs and make an arrest. In each operation, the OHA officers filed false police reports. In many of the operations, they also beat the undercover officer or stole money. In Operation Five, two Oakland Police officers got caught, as follows:

> ". . . two marked Oakland Police Department patrol units arrived on the scene followed by three unmarked OHA vehicles. The black officer, who arrived in vehicle 1923 contacted the undercover officer . . . Officer Garden [OHA officer] immediately started to search the area and found the white bag at the rear porch. . . . At 2052 hours, the Black OPD officer handcuffed the Undercover Officer. Officer Garden handed him the white paper bag . . . "

(Exhibit 10, pages 57-58)

The police report however, told a different story.

"Officer A.K. Rachal # 7572P of the Oakland Police Department wrote the report. . . . As he was driving down the street he observed an individual . . . standing on the south side of the street. Due to the darkness of the street he activated his high beam lights. At that point he observed Jones discard a white bag from his left hand which fell by his left foot . . ."

(Exhibit 10, page 60)

Example 6

CASE STUDY: BEATING AND FALSE ARREST —RECREATION DIRECTOR

Two newspaper clippings describe the false arrest and beating of a local housing project recreation director by an Oakland Police Officer. (See Exhibit 13)

This recreation director was beaten and arrested when he asked an Oakland Police officer to drive more slowly in an area where there were many children playing.

The charges were dropped and a citizen's complaint against the officer was sustained by the police department. (This was the fourth sustained complaint against that particular police officer). However, the officer still patrols the area. The officer is still a member in good standing with the Oakland Police Department.

The news articles discuss the effect of the beating and arrest on the children who idolized the recreation director, a man who was considered a role model for youth. Many of these children observed the beating and the arrest. It is likely that some of these youngsters may exhibit panic in the presence of police officers based not upon guilt but upon fear. We submit that similar experiences are not uncommon.

CONCLUSION

This Amicus Brief does is not intended as an indictment of all law enforcement in Oakland. However, the actions of a minority of bad cops can poison our communities and hamper the performance of the majority of good cops.

It is exceedingly difficult to disprove "he ran, he dropped" allegations and it is exceedingly easy to manufacture such probable cause to arrest. Expanding police power in this area will not ease the job of law enforcement. Instead, it will fortify the defenses of the unethical police officer and make it more difficult to separate out the bad apples.

An overburdened judicial system cannot effectively attack an officer's veracity *unless there are other objective factors against which the truth of the officer's testimony may be tested.* Current standards of cause to detain and probable cause to arrest to some degree require objective (i.e. testable/contestable) verification. The "he ran" or "he looked nervous at my approach" scenario is totally subjective. The ability of an officer to "charge" after a "suspect" on those grounds and to retain any object which is "dropped", is in essence a license to conduct a general search based upon a "hunch".

From experience we know that such "hunches" will be based upon race, age, economic status and cultural factors, i.e. young, Black males will be disproportionately subject to a general search.

A trained and honest officer does not need the changes urged by the Attorney General in *Hodari D.* Drug sales are by necessity, made to strangers, in the open and in plain view. There is no mystery as to how to catch drug dealers. They operate in plain view and they will sell to anyone who is not wearing a uniform. Making legitimate drug arrests is as easy as shooting ducks in a pond. While the task is more difficult for uniformed officers, the answer is to use more undercover officers to make buys, not to provide powers which amount to the right to make non-cause searches.

Accordingly, the decision of the California Court of Appeal in *Hodari D.* is correct, and the position of the California State Attorney General should be rejected by this court.

Dated: December 18, 1990

MARVIN CAHN
1256 Market Street
San Francisco, California
(415) 864-3131
Counsel of Record

DANIEL A. HOROWITZ
120 Eleventh Street
Oakland California
Telephone: (415) 444-4888
Of Counsel